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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 349.

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM, AND JOE R. SOUTHARD, JR., *Petitioners,*

v.

MARYLAND CASUALTY COMPANY, OF BALTIMORE, A CORP., MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, J. K. PERKINS, MRS. F. BATES, GLEN PERKINS, BESSIE MATHEWS, MRS. ELOUISE KLUP, LEGGETTE HALL, LAMAR HALL, MARGUERITE BRADLEY KELLEAM, MARY KATE HALL, KELLEAM HALL, CLIFFORD KELLEAM, KATHLEEN KELLEAM, DR. FANNIN KELLEAM, FRANCIS KELLEAM, MRS. JIMMIE KELLEAM AND ROBERT KELLEAM, *Respondents.*

## BRIEF OF MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, RESPONDENT, IN ANSWER TO BRIEF OF PETITIONERS.

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## INDEX.


| | Page |
|---|---|
| Statement and History of the Case | 1 |
| Specifications of Error | 10 |
| Summary of Argument | 10 |
| Argument and Authorities | 12 |
| "I. Jurisdiction of the County Courts of Oklahoma in Probate Matters is Exclusive Original Jurisdiction." | 15 |
| "II. That Jurisdiction Was Duly Invoked and Exercised Prior to the Institution of the Instant Proceeding as to Both the Subject Matter and the Parties" | 16 |
| "III. The Judgment of the County Court Refusing to Vacate the Decree Was in Conformity to Local Law" | 19 |
| "IV. It Was the Duty of the Federal Court to Sustain the Plea of the Petitioners to Dismiss the Bill of the Surety for Want of Jurisdiction at the Trial" | 21 |
| "V. It Was the Duty of the Court to Sustain Motion to Dismiss Both the Bill and the Cross Petition at the Trial for Want of Jurisdiction" | 26 |
| Conclusion | 31 |


## CASES CITED.


| | |
|---|---|
| Anderson v. Watt, 138 U. S. 694, 11 S. Ct. 449, 34 L. Ed. 1078 | 28 |
| Beatty v. Beatty, 114 Okla. 105, 242 Pac. 766 | 13 |
| Carney v. Commonwealth O. & G. Co. (D. C. Kans. 1933) 5 Fed. Sup. 304 | 15 |
| Caulk v. Lowe (Sup. Ct. of Okla.) 74 Okla. 191, 178 Pac. 101 | 13 |
| Central Surety & Ins. Corporation, et al. v. Bagley, (Dist. Ct. S. D. Calif. Cent. Div.) 44 F. (2nd) 208 | 25 |
| Charlotte Weyant et al., Respt. v. Utah S. & T. Co., Appt. 182 P. 189; 9 A. L. R. 1119 | 19 |

Page

Commonwealth Trust Co. v. Bradford, 297 U. S. 613, 619, 56 S. Ct. 600, 80 L. Ed. 920 ..... 15
Continental Ins. Co. v. Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380 ..... 27
Dawkins v. Peoples Bank & Trust Co., 117 Okla. 181, 245 Pac. 594 ..... 14
Desmore v. U. S., 93 U. S. 605, 23 L. Ed. 959 ..... 28
Des Moines Bridge & Iron Works v. Plane et al., 163 Iowa 18, 143 N. W. 866 ..... 28
Exendine v. Iron, 4 P. (2) 1035, 153 Ok. 177 ..... 19
Fidler v. Roberts, 7 Cir, 41 F. 2nd 305 ..... 27
Forgy v. Lamphear, 144 Okla. 245, 291 Pac. 83 ..... 14
Glades County, Florida v. Detroit Fidelity & Surety Co., 449, 57 F. (2) ..... 25, 28
Green's Estate, 80 Okla. 256, 196 Pac. 128 ..... 13
Halsted v. Buster, 119 U. S. 341, 7 S. Ct. 276, 30 L. Ed. 462 ..... 27
Hartford A. & I. Co. v. Goldberg, 61 P. (2) 704, 178 Ok. 75 ..... 17
Hewitt v. Hewitt, et al., 17 Fed. (2) 716 ..... 16
Hills v. F. S. Harmon & Co., 56 Fed. (2) 662 ..... 30
Howe v. Howe & Owen Ball Bearing Co., 8 Cir. 154 F. 820 ..... 27
Johnson v. Petty, 118 Ok. 178, 246 P. 848 ..... 19
Mahon v. Somers, et al. cc Ohio, 112 F. 174 ..... 28
Marshall v. Holmes, 141 U. S. 589, 12 S. Ct. 62, 35 L. Ed. 870 ..... 16
Morley Construction Co. v. Maryland Casualty Co., 300 U. S. 185, 81 L. Ed. 593 ..... 25
Morley Construction Co. et al. v. Maryland Casualty Company, (C. C. A. 8th Cir. 1937) 90 F. (2nd) 976 ..... 24, 28
Porter et al. v. Cook, 63 Fed. (2) 637 ..... 29
Porter Land & Water Co. v. Baskin, 43 Fed. 323 ..... 29
Primos Chemical Co. v. Fulton Steel Co., 254 Fed. 455. 30
Princess Lida of Thurn and Taxis v. Thompson, 305 U. S. 456, 59 S. Ct. 275, 281, 83 L. Ed. 285 ..... 15
Realty Holding Co. v. Donaldson, 268 U. S. 398, 45 S. Ct. 521, 69 L. Ed. 1014 ..... 27
Republic Nat. Bank & Trust Co. et al. v. Massachusetts Bonding & Ins. Co. (C. C. A. 5th Circuit) 68 Fed. (2) 445 ..... 28, 29

Page

Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057 ..... 27
Sanford v. United States Fidelity & Guaranty Co., (Ga. Sup. Ct. 1902) 116 Ga. 689, 43 S. E. 61 ..... 25
Security Trust Co. v. Black River Nat'l Bank, 187 U. S. 211, 23 Suppl. Ct. Rep. 52, 47 L. ed. 147 ..... 21
Southwestern Surety Ins. Co. v. Wells, et al., 217 F. 294 ..... 28
Sun Printing & Publishing Ass'n v. Edward, 194 U. S. 377, 24 S. Ct. 696, 48 L. Ed. 1027 ..... 27
Taylor v. Harris' Admr. et al., 164 Ky. 654, 176 S. W. 168 ..... 28
Tyler et al. v. Stanolind Oil & Gas Co., 77 Fed. (2) 802. 30
Walton v. Williams, 5 Okla. 262, 43 Pac. (2) 1028... 28
Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 44, 30 S. Ct. 10, 54 L. Ed. 80 ..... 15
Wolfe v. Insurance Co., 148 U. S. 389, 13 S. Ct. 602, 37 L. Ed. 493 ..... 27
Wheeler v. Bigheart, 172 Okla. 262, 43 P. (2) 1077.... 14

## STATUTES CITED.

Chap. 225, 43 Stat. 938, 28 U. S. C. A. 347; Para. 5 (b) of Rule 38 ..... 9
Okla. St. Ann. Title 58, Sec. 127; O. S. 1931, Sec. 1142.. 2
Okla St. Ann. Title 58, Sec. 128; O. S. 1931, Sec. 1143.. 2
Okla. St. Ann, Title 84, Sec. 221; O. S. 1931, 1626.... 3
O. S. A. title 12, Sec. 1108 ..... 23
O. S. A. title 12, Section 1109 ..... 23
O. S. A. title 58, chapter 3, Sec. 127 ..... 17
O. S. A. title 84, Sec. 213 ..... 13
Section 88 Oklahoma Statutes 1931 ..... 23
Section 116, title 28 U. S. C. A. ..... 22
Sec. 116 U. S. C. Ann. Title 28 (Judicial Code Sec. 55) 24
Sec. 118 U. S. C. A. title 28 ..... 8, 22, 29
Section 240 of the Judicial Code as amended by the Act of February 13, 1925 ..... 9
U. S. C. Ann. Title 12, Section 118 (Judicial Code Sec. 57) ..... 24
9 A. L. R., page 1123 ..... 19
302 U. S. 748, 82 L. Ed. 578, 58 S. C. 266..... 24
302 U. S. 779, 82 L. Ed. 602, 58 S. C. 362..... 24
90 F. (2d) 976 ..... 25

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v.

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## BRIEF OF MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, RESPONDENT, IN ANSWER TO BRIEF OF PETITIONERS.

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### STATEMENT AND HISTORY OF THE CASE.

In order to give this Honorable Court, in the beginning, a comprehensive understanding as to what led up to the suit at bar and to correct certain inaccuracies and supply certain omissions that are not shown in the statement of the case by the petitioners, we give the following history and make the following statements concerning the same.

This is an action by a surety on an administrator's bond for protection from a void distribution of the assets of the estate to the exclusion of certain heirs of the decedent. These omitted heirs sought to set aside the void distribution of the estate and from the facts it appeared quite likely under the laws of the State of Oklahoma that the omitted heirs would succeed in vacating the void order of distribution and would then proceed against the surety on the administrator's bond because certain assets of the estate were or had already been placed in hands other than those of the distributees and therefore the surety, alarmed, sought enforcement of its equitable remedy of exoneration.

All references herein to pages in transcript of the record refer to the printed record in this Honorable Court.

Leggette D. Kelleam, a resident of Creek County, Oklahoma, died intestate August the 8th, 1936. (Tr. p. 21 and Tr. p. 67) His heirs according to the findings of the trial court, were those whose names appear in the transcript at pages 68 and 69.

On August 25, 1936, E. A. Kelleam and Nell Southard, nee Kelleam, full brother and sister of the deceased Leggette D. Kelleam, filed a petition in the County Court of Creek County for the appointment of E. A. Kelleam as administrator. (See T. p. 2) In this petition they alleged that they were the sole and only surviving heirs. They omitted giving the names, ages, and residence of other heirs of the deceased as required by the Oklahoma Statute (Okla. St. Ann. Title 58, Sec. 127) (O. S. 1931, Sec. 1142), and gave no notice as required by the statutes. (Okla. St. Ann. Title 58, Sec. 128 (O. S. 1931, Sec. 1143)

On the same day without notice E. A. Kelleam was appointed administrator and duly qualified as such by filing and executing a bond in the sum of $12,000, upon which bond this respondent Maryland Casualty Company is surety. (Tr. p. 24) He filed an inventory (Tr. p. 26). Assets exceeding $25,000.00 were listed. He filed a final report, which report is omitted from the transcript in this

Court by stipulation of the parties as not pertinent to this appeal.

He filed his petition for determination of heirship and for a decree of distribution, again alleging that he and his sister were the sole heirs of Leggette D. Kelleam, deceased.

All of the remaining half brothers and half sisters and children of deceased's half brothers and half sisters were completely omitted from this request for distribution.

Prior to the hearing of this final account and distribution, Fannie Bates, a half-sister and the surviving children of Mrs. Klyde Bates learned of the probate proceedings and contacted E. A. Kelleam and Nell Southard concerning same.

It is important to note at this point, that under the laws of descent and distribution in Oklahoma, heirs of the decedent who were half-blood kindred inherited equally with these of the whole blood. (Okla. St. Ann, Title 84, Sec. 221) (O. S. 1931, 1626)

> "Kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance."

If the estate of Leggette D. Kelleam was an ancestral estate, that is, coming to him by descent, devise or gift of some one other than an ancestor of the half blood kinsmen, then the half-blood kinsmen could not share in the inheritance.

A contract was at this time executed by E. A. Kelleam and Nell Southard on the one hand and Fannie Bates and the surviving husband and children of Mrs. Klyde Bates, now deceased, whereby E. A. Kelleam and Nell Southard agreed to deposit $4000.00 in the bank, together with the contract (see Tr. pp. 29 to 32), and it was agreed that this sum should be paid to them for any interest they claim in the estate providing none of the heirs of any of the other

half-brothers or half-sisters of the deceased came in and filed a claim. But that if, prior to final distribution any party claimed to be interested in the estate and appeared in the County Court and questioned the right of E. A. Kelleam and Nell Southard to the entire estate, then E. A. Kelleam and Nell Southhard would be entitled to withdraw the $4000.00 in escrow. The contract also provided that it did not constitute the entering of an appearance in the County Court by Fannie Bates or the heirs of Mrs. Klyde Bates.

After the execution of this contract and before the final hearing for distribution an amended petition for approval of final account and for decree determining heirship and distribution of the estate was filed by E. A. Kelleam and Nell Southard (Tr. p. 32).

This amended petition, after setting out the family tree of the Kelleams averred that one Mary Ayres Kelleam, one and the same as M. A. Kelleam, was the mother of the deceased Leggette D. Kelleam and of E. A. Kelleam and Nell Southard, nee Kelleam, and that these three were her sole heirs and were the only heirs of the deceased Leggette D. Kelleam. The amended petition deliberately, and we believe with intention to defraud all of the half-blood kinsmen, went on to allege that all of the property of which Leggette D. Kelleam died seized was an ancestral estate coming from his mother to the deceased. The petition recited that the deceased owned at the time of his death an undivided seven-sixteenths of the working interest and a one-eighth of the overriding interest in the Sam Vance lease, an oil and gas lease in Creek County, Oklahoma, describing same.

The petition then goes on to set out that the mother of the deceased during her lifetime, and as an advancement to the said Leggette D. Kelleam, in lieu of a portion of his share of her estate, purchased for him all property owned by the deceased Leggette D. Kelleam at the time of his death.

At this point we wish to call special attention to the fact that the mother, Mary Ayres Kelleam, died on December 4,

1928. (Tr. 90) Also to show how rank a fraud the foregoing petition was, together with the subsequent distribution by the County Court of Creek County, we desire to call this Court's attention to numerous items which could not be gifts, or advancements, for they were acquired by the decedent, Leggette D. Kelleam, long after the death of his mother. For instance, at page 89 of the transcript, we see that the two Drumright, Okla., properties were acquired by Leggette D. Kelleam, one in 1932 and the other in 1935. Also the Oklahoma City properties (Tr. 112) were acquired in 1933. The interest in the so-called Sam Vance lease acquired in 1930. (Tr. 107) The inventory, the administrator filed, also lists certain items, that by no stretch of the imagination can be termed ancestral, or called gifts or devises, or inherited property from the departed maternal ancestor. For instance, at pages 27 and 28 of the transcript appears a Ford coupe, 1936 model, and also a promissory note of R. J. and Nell Southard dated 4/6/29 for $4000.00; a note from Grover Keely dated 6/12/29 for $100.00; a note from R. J. and Nell Southard for $1000.00 and dated 9/8/1931; a note from Pleas Carter dated 4/3/1935 for $25.00; a note from R. J. and Nell Southard dated 9/8/1931 for $700.00; a note from J. M. Pinkston and Lou Ann Pinkston for $400.00 dated 6/22/1929.

Thereafter, on the day appointed for the hearing the County Court entered its judgment order and decree finding and determining that the estate of Leggette D. Kelleam, deceased, was a maternal ancestral estate and ordered distribution thereof to E. A. Kelleam and Nell Southard.

The only notice claimed to have been given to the half-blood heirs was a notice by publication, which appears in the transcript pages 35 to 41. On September 23rd, 1937, a petition to reopen the proceedings was filed (Tr. p. 133) and an amended petition was filed on December 28th, 1937. (Tr. pp. 115 to 118) This amended petition was filed by the children of the prior deceased's half brothers and half sisters of Leggette D. Kelleam, deceased, setting forth their relationship to the deceased and stating that they had no notice of these

proceedings and that the distribution of the estate was fraudulently and collusively obtained and asking that the decree of the county court be set aside.

The Maryland Casualty Company, surety on the administrator's bond, learned of these proceedings and that Dr. E. A. Kelleam was divesting himself of title to the assets. (Tr. p. 100)

It is to be noted that none of the defendants deny that E. A. Kelleam and Nell Southard were divesting themselves of the properties but all admit it in their various answers. (Tr. pp. 50 to 55) Obviously if the half-blood heirs succeeded in vacating the order of distribution, or having same vacated for fraud, then the surety surely would be called upon to pay the half-blood heirs if no recovery could be had by them from E. A. Kelleam and Nell Southard, distributees under this void order.

Accordingly, to protect itself, a representative of the Maryland Casualty Company was sent to interview E. A. Kelleam in an effort to secure the company from harm. (Tr. pp. 95 to 100) The purpose of this visit is clear from the testimony of the representative J. C. Thomas. Thomas said, "We wanted this property conserved in event the heirs that brought this action in Creek County were able to successfully come in and reopen the case". "I just suggested that he put this property where it could be on hand in the event they were successful in reopening the case. I didn't have any definite proposition—any certain place he should put it. He knew what I was talking about." * * * "My idea in going to see Dr. Kelleam was to try to work out an arrangement where the Maryland Casualty Company would be protected in event there was a claim."

Thomas also testified that at the time he talked to Dr. Kelleam, conveyances had been made by him and his sister, Nell Southard, in an attempt to put the corpus of this estate in their children. This representative got no satisfaction. Later in the proceedings another effort to get E. A. Kelleam to indemnify or satisfy the Maryland Casualty Company was made. (See the testimony of Streeter Speakman at

page 100 of the transcript and also his letter to E. A. Kelleam, transcript page 101.) The letter says:

> "The thing that has raised their suspicion and caused them to take a hostile attitude toward you is the fact that you made a transfer of this property to your son. This of course was made without my advice or knowledge, and if you had consulted me I would have advised you in the first instant to desist from such a procedure."

After the filing of the suit herein, E. A. Kelleam and Nell Southard demurred to the amended petition to reopen the case in the County Court of Creek County and on September 15, 1938, the County Court sustained the demurrer and the proceeding to reopen was dismissed. (Tr. pp. 92-93) The case was appealed by the petitioners to the District Court of Creek County where it remained on appeal and is still pending, so far as this litigant knows.

The Maryland Casualty Company on June the 8th, 1938, sought relief in the United States District Court for the Northern District of Oklahoma by filing its bill of complaint making the full-blood heirs, as well as the half-blood kinsmen of the deceased Leggette D. Kelleam, defendants, seeking exoneration on its bond and asking that a Receiver be appointed to preserve the decedent's property, which had been distributed by the alleged decree procured by fraud, pending the outcome of the dispute between the heirs (Tr. pp. 5-10) and that the property be impressed with an equitable lien to satisfy and discharge any final judgment that might be obtained between the litigating parties.

Subsequently an amended complaint was filed. (Tr. pp. 45-49) The complaint set out that certain of the assets of the Leggette D. Kelleam estate were within the Northern District of Oklahoma. (Tr. pp. 6 and 7) The defendant, Mrs. Frances Kelleam, was served with a chancery subpoena on June 14, 1938. On June 18th, 1938, the cross-petitioners filed their separate answer and cross-petition wherein they asserted their claim to an interest in the estate and joined in the application for the appointment of a receiver.

On June 23rd, 1938, J. M. Scott was appointed Receiver of certain assets of the estate of Leggette D. Kelleam. (Tr. p. 84) These assets consisted only of the Drumright Creek County, Oklahoma, real estate and the Oklahoma City, Oklahoma, real estate and the Sam Vance oil and gas lease in Creek County, Oklahoma.

Thereafter on June the 25th, 1938, plaintiff in compliance with title 28, Sec. 118 U. S. C. A. procured issuance of an order for service on defendant outside of district. (Tr. pp. 42 and 43) Order was served upon the defendant E. A. Kelleam and Joe E. Kelleam personally at Sells, Arizona. (Tr. pp. 42-43) Previously a chancery subpoena had been issued and served upon the defendant Nell Southard and J. R. Southard, Jr., at Blanchard, Oklahoma, on July 17, 1938. All these four defendants, after filing special pleas to the venue and jurisdiction of the court and upon such pleas being overruled, moved to strike the cross-petition for want of jurisdiction of the subject matter which was overruled, and the defendants then filed their answer and plea in abatement and answer to the cross petition (these various pleadings appear Tr. pp. 43 to 55).

With the issues thus joined, this cause was tried by the Trial Court in the Northern District of Oklahoma on June 21st, 1939 and for the proceedings had and the testimony developed at the trial on behalf of the Maryland Casualty Company, we refer this Honorable Court to the printed record of this cause (Tr. pp. 86 to and including near the bottom of page 111); and, for the proceedings had and the evidence developed in the trial court by the cross-petitioners we call the court's attention to the printed record in this cause. (Tr. pp. 111-113 inc.)

At the conclusion of the trial on June 21st, 1939, the Trial Court directed the parties to submit brief and took the matter under advisement; and then on August 30th, 1939, made Findings of Fact entered a decree—both of which Findings of Fact and Decree were filed on September 26th, 1939, and are set out—the Findings of Fact and Conclu-

sions of Law (Tr. pp. 67 to 78) and the Decree (Tr. pp. 78 to 82).

The Trial Court found, as shown by his findings of fact and conclusions of law that the estate of Leggette D. Kelleam was not an ancestral estate—that the decree of the county court of Creek County, Oklahoma, was obtained by the petitioners, E. A. Kelleam and Nell Southard, by fraud on their part, and was, therefore, void. That the half-sisters and the half-brothers, and the children of the deceased half-sisters and half-brothers were heirs and entitled to share in the estate of Leggette D. Kelleam.

That E. A. Kelleam and his surety were liable to the defrauded heirs; that the surety company was entitled to exoneration and to have the estate impressed with a trust; and the decree impressed a trust upon the property in favor of the defrauded heirs, for their distributive shares in the estate and in favor of the surety for E. A. Kelleam, and ordered the property in the hands of the Receiver sold to satisfy these liens—unless, an accounting be made and the defrauded heirs given their share of the estate.

From this decree an appeal was prosecuted to the Circuit Court of Appeals by the defendants in that cause, who appear in this case as the petitioners.

The Circuit Court of Appeals affirmed the decree of the Trial Court and rendered its opinion on June 17th, 1940, which opinion is set out in the record. (Tr. pp. 136-145 inclusive)

It is from the judgment and decree of the Circuit Court of Appeals that this cause has been ordered to this Honorable Court by Writ of Certiorari for its review, on specifications of error complained of and under jurisdictional statute invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925. (Chap. 225, 43 Stat. 938, 28 U. S. C. A. 347; and under Para. 5 (b) of Rule 38)

## SPECIFICATIONS OF ERROR.

This suit has been brought to this Honorable Court by the petitioners, as we take it from the record, solely on jurisdictional errors contended by the petitioners to have occurred in the proceedings in the lower court.

The petitioners have classified these specifications of error into two main divisions and have further classified this in their argument into five divisions.

The first contention of the petitioners is that the Federal Court could not acquire any jurisdiction in this case for that the matters involved herein were originally in and taken cognizance of by the county court of Creek County, Oklahoma, and that all of the parties were before that court and full relief could be granted by that court and it had exclusive jurisdiction and that therefore this action could not be maintained.

The second contention was that the county court of Creek County having original jurisdiction in the probate case and having exercised this jurisdiction and having adjudicated all of the matters pertinent to the subject matter, in which these parties were interested, the Federal Court could not interfere with the jurisdiction of the State Court in the administration of that estate. Petitioners, therefore, contend that by this action the Federal Court did in fact interfere with the jurisdiction of the county court of Creek County in the due administration of the estate. Therefore, that this constitutes a conflict between the State and Federal Courts.

## SUMMARY OF ARGUMENT.

In presenting the argument in this case the petitioners have divided their presentation of the matters controlling, as they claim, into four divisions; and we shall attempt in answering petitioners' argument to follow as closely as feasible and possible the outline of the petitioners in their presentation, although in the outset and at this point we must frankly state we cannot follow petitioners' reasoning or line of argument as it has been presented, since it is in

conflict, as we understand it, with all of the controlling decisions in connection with the matters involved herein.

This respondent, the Maryland Casualty Company, brought a suit in the United States District Court alleging it was a citizen and resident of the state of Maryland, the state in which it was incorporated and which gave rise to its existence, upon the one hand and against all of the Kelleam heirs, both full blood brothers and sisters of the deceased Leggette D. Kelleam and the half-blood brothers and sisters and children of half-blood brothers and sisters now living, who constitute all of the heirs of the said Leggette D. Kelleam, deceased. All of these last named persons lived, resided and had their residences in some state other than the residence and citizenship of the Maryland Casualty Company. This was alleged and then proof to sustain same was made, at the time of trial; so that, in the first instance this became a suit and cause of action between the Maryland Casualty Company upon the one hand—a citizen and resident of Maryland—and citizens upon the other hand who were known non-residents of the state of Maryland, so that we met the first requirement that the action was between citizens of different states.

Then too, the relief sought was to establish a lien upon and a claim to certain property, real and person, a large portion of which had its fixed character in Creek County, Oklahoma, which is in the Northern District of Oklahoma and the balance of the property involved had a fixed character in Oklahoma County, located within the Western District of the United States District Court of Oklahoma, an adjacent district to the northern district.

The fact that the property involved in this action was located both in the Northern District for the United States District Court for the State of Oklahoma and in the Western District of the United States District Court for the State of Oklahoma entitled the plaintiff, if it had a cause of action of a local nature, to bring this suit in either the Northern District of the United States District Court for Oklahoma or the Western District of the United States

District Court for Oklahoma, and that then left only the question of whether or not, under the laws of this jurisdiction, the suit involved here was one of a local nature and one under the fixed law of this jurisdiction the plaintiff was entitled to maintain.

## ARGUMENT AND AUTHORITIES.

The petitioners in this cause seem to have a notion that this is a suit on an administrator's bond, and that the right of the Maryland Casualty Company must have been in the bond. That is not the nature of this suit at all.

This is an action brought by the surety on the administrator's bond in the nature of a suit in exoneration and to impress a lien upon the property involved, which had been distributed by the administrator to himself and to his sister from the estate of the deceased brother Leggette D. Kelleam by a series of fraud.

The administrator, E. A. Kelleam, in collusion with his sister Nell Southard had perpetrated an extrinsic fraud on the county court of Creek County, Oklahoma, to obtain at the hands of such county court all of the estate of Leggette D. Kelleam, deceased for themselves and at the expense of all the other heirs, and the surety on the administrator's bond. The half-blood heirs had discovered this deceit and fraud practiced by E. A. Kelleam and his sister, Mrs. Nell Southard, and were seeking to set aside the decree under which all of this property had apparently been given to E. A. Kelleam and Nell Southard.

Under the law of this state, upon the death of a person his property—both real and personal—descends to his heirs, subject only to the right of administration. The law fixes the title and ownership in and to the property and this title and ownership is incumbered only by the debts and obligations to be paid through administration. The decree of the county court does not then within itself, pass any title. It is only evidence of the fact to whom the title descended by operation of law, under the law of descent and distribution in this state.

That the half-blood brothers and sisters and other heirs were entitled to inherit equally with the whole blood brother and sister of the deceased Leggette D. Kelleam, under the law of the State of Oklahoma is not disputed, but is clear. See O. S. A. title 84, Sec. 213.

> "When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner: * * *
>
> "Third. If there be no issue, nor husband nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if the deceased, being a minor, leave no issue, the estate must go to the parents equally, if living together, if not living together, to the parent having had the care of said deceased minor."

If the estate of Leggette D. Kelleam was ancestral, coming from the mother of Leggette D. Kelleam, the half-blood heirs were excluded, if it was not ancestral they were entitled to inherit.

In any event, they were entitled to their day in court and if E. A. Kelleam and Nell Southard practiced a fraud upon the County Court of Creek County, Oklahoma, depriving them of their day in court, then the Order of the county court was void. This is clearly the law in the state of Oklahoma and in support of this contention we call the court's attention to the Oklahoma case of *Beatty* v. *Beatty,* 114 Okla. 105, 242 Pac. 766. This case we have quoted from at length in our brief filed in this cause in opposition to petition for writ of certiorari at page 13.

The Oklahoma court is committed to the doctrine that various forms of decrees obtained by fraud avail the persons obtaining them no protection. Upon this question we cite the following cases:

*Caulk* v. *Lowe,* (Sup. Ct. of Okla) 74 Okla. 191, 178 Pac. 101;
*Green's Estate,* 80 Okla. 256, 196 Pac. 128;

*Dawkins* v. *Peoples Bank & Trust Co.*, 117 Okla. 181, 245 Pac. 594;
*Forgy* v. *Lamphear*, 144 Okla. 245, 291 Pac. 83;
*Wheeler* v. *Bigheart*, 172 Okla. 262, 43 P. (2) 1077.

All questions raised by the petitioners herein were extensively dealt with by the Circuit Court of Appeals and authorities there cited to sustain the contention of the Circuit Court of Appeals and especially we invite the attention of this learned court to the very able opinion of the Circuit Court of Appeals shown in the record of this cause. (Tr. pp. 136-145)

On page 19 of the petitioners' brief we want to call special attention to the following assertion:

> "The Circuit Court conceded and the trial court found no complete diversity of citizenship between the contending claimants (R. 68-9) insofar as the action was one to impress a trust upon real or personal property there was no complete diversity of citizenship between those seeking this relief."

We believe by an examination of the record that this Honorable Court will be impelled to the conclusion that there is nothing shown to justify the above statement and the argument that follows, down to and including the bottom of page 23 of petitioners' brief.

On page 20 of petitioners' brief, second paragraph thereof, petitioners state:

> "The opinion suggests the property had a fixed situs in the northern district, but the decree was limited to no particular property but fixed a lien upon it all, real, personal and mixed, with no proof of its situs."

With reference to this statement a mere casual examination of all the pleadings in this cause and the property dealt with by the trial court and the Circuit Court of Appeals clearly discloses that the only property dealt with in this action—the only property that was affected by this action, or attempted to be affected, were the two houses and lots in Drumright, Creek County, Oklahoma; Sam Vance

oil and gas lease in Creek County, Oklahoma and the property in Oklahoma County, Oklahoma, and even if the court had attempted to—but it did not—affect any other property, it would not void the action of the court so far as the property within its jurisdiction is concerned, but only the property beyond its jurisdiction. *Carney* v. *Commonwealth O. & G. Co.* (D. C. Kans. 1933) 5 Fed. Sup. 304.

We shall employ the petitioners' titles in the following argument.

**"I. Jurisdiction of the County Courts of Oklahoma in Probate Matters is Exclusive Original Jurisdiction."**

As to this proposition advanced by the petitioners we make no objection, nor do we quarrel with any of the authorities therein cited. The only answer we have to that proposition is that these cases are not applicable to this cause because there is no attempt here to administer on the estate of Leggette D. Kelleam deceased, or to interfere with the county court of Creek County or its administrator. We concede that the administrator appointed by a county court is an officer of that court—takes possession of the decedent's property in obedience to the order of the court, and that the administrator's possession is the court's possession and cannot be disturbed by any other court. However, it is a well settled rule that a person entitled to a distributive portion of an estate may establish his right to share therein and to enforce this right against the administrator personally, or his surety, or against any other person that may be liable therefor. And this kind of a proceeding does not disturb the possession of the property by the said court. Citing *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 44, 30 S. Ct. 10, 54 L. Ed. 80; *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 619, 56 S. Ct. 600, 80 L. Ed. 920; *Princess Lida of Thurn and Taxis* v. *Thompson*, 305 U. S. 456, 59 S. Ct. 275, 281, 83 L. Ed. 285.

There is no attempt made in this case to interfere with the administrator's possession of this estate. The case has

been closed, the property has been distributed to those claiming to be the heirs; and at the time of instituting this suit, the property stood in their names and this is a proceeding against the persons who wrongfully procured this property.

The Circuit Court of Appeals for the Ninth Circuit has specifically held this kind of an action may be maintained—that the omitted heir can sue the administrator for a distributive share in an estate and that the United States District Court may deprive a party of the benefits of a decree fraudulently obtained in a state court, since same does not operate on the court but on the parties. *Hewitt* v. *Hewitt, et al.*, 17 Fed. (2) 716, and to the same effect is the case of *Marshall* v. *Holmes,* 141 U. S. 589, 12 S. Ct. 62, 35 L. Ed. 870.

**"II. That Jurisdiction Was Duly Invoked and Exercised Prior to the Institution of the Instant Proceeding as to Both the Subject Matter and the Parties."**

The petitioners take the position that the Maryland Casualty Company had invoked the jurisdiction of the county court prior to instituting this suit and under those provisions of this proof on page 28 single out the following:

> "Q. Mr. Green did appear in the County Court?"
> "A. That is right, he was representing the Maryland Casualty Company." (R. 97)

That is the only place in this part of the brief they undertake to bind this respondent by reason of anything done in the County Court. Upon examining the record you will note that is simply a question and answer elicited by a witness on the trial of this case and does not rise to the dignity of showing that this respondent in any way conceded to or invoked the jurisdiction of the county court. A reading of the record will disclose that when these half-blood heirs filed their protest in the county court, in order that the surety on the administrator's bond would, after the case had been closed, upon reopening, be liable for the acts

of the administrator, the surety would have to be notified of this proceeding.

This is the rule in this state, in the case of *Hartford A. & I. Co.* v. *Goldberg,* 61 P. (2) 704, 178 Ok. 75. Although the record is not clear upon it, this respondent Maryland Casualty Company was appearing in the county court in an effort to quash this notice.

The petitioners make the bold assertion no personal notice is required in administration proceedings and would leave the impression with this Honorable Court that everything that was done in this cause in the original probate proceeding, was regular. In this connection we would like to call the court's attention to the statute of the State of Oklahoma governing the petition for and appointment and qualifications of administrators. O. S. A. title 58, chapter 3, Sec. 127:

"REQUISITE OF PETITION FOR ADMINISTRATOR"

"Petition for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the Judge of the court, stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages and residences of the heirs of the decedent, and the value and character of the property. * * *"

O. S. A. title 58, Chapter 3, Section 128:

"NOTICE OF HEARING. When a petition praying for letters of administration is filed, the Judge of the County Court must set a day for hearing the same and cause notice thereof to be given, containing the name of the decedent, the name of the applicant for letters, and the day on which the application will be heard; said notice must be given by posting the same in three public places in the county, one of which shall be at the court house in which said hearing is to be held, and a copy of the same shall be mailed to each of the heirs of the deceased, with the postage thereon prepaid. If the post office address of any of the heirs is

unknown, notice of said hearing shall be given by publishing the same in some newspaper published in said county, at least ten days before the date set for said hearing; * * *"

O. S. A. title 58, Chapter 3, Section 130:

"HEARING OF PETITION—ORDER. On the hearing, it being first proven that notice has been given, as herein required, the Court must hear the allegations and proofs of the parties; and order the issuing of letters of administration to the party best entitled thereto."

O. S. A. title 58, Chapter 3, Sec. 162:

"NON-RESIDENT REPRESENTATIVE MUST APPOINT AGENT: Every administrator, executor, or guardian, appointed in but residing out of the state, shall before entering upon the duties of his trust, in writing, appoint an agent residing in the county where he is appointed, and shall by such writing stipulate and agree that the service of any legal process upon him as such executor, administrator or guardian, if made on said agent shall be of the same legal effect as if made on himself personally within the state. Such writing shall give the proper address of such agent and shall be filed in the office of the Judge of the county court, in which such appointment is made."

Clearly, from the above cited statutes of this state, it is a fixed policy of the law of this state that before administrators shall be appointed of decedents estates, they shall comply with the law and give the court the information of who the heirs at law are; their names and addresses; that notices must be mailed to them personally and that they be given a right to come in and protect their interests. In this particular case, not only the administrator and his sister did not give these notices but they concealed at that time from the court that there were any other heirs. Not only that, but the administrator gave his address as Drumright, Creek County, Oklahoma, and did not make the appointment of a service agent for himself as a non-resident of Oklahoma, thus at least by this omission representing to the court that he was a resident and citizen of Oklahoma.

We concede, as is held in the case of *Johnson* v. *Petty*, 118 Ok. 178, 246 P. 848, and also in the case of *Exendine* v. *Iron*, 4 P. (2) 1035, 153 Ok. 177, that as to valid binding judgments rendered by the county court, there can be no collateral attack.

We likewise contend that this proceeding is not a collateral attack and that a proceeding in equity to set aside a probate decree for fraud for procuring it is a direct as contradistinguished from a collateral attack.

In the case of *Charlotte Weyant et al., Respt.* v. *Utah S. & T. Co.*, Appt. 182 P. 189; 9 A. L. R. 1119, the Supreme Court of Utah in the third syllabus of the case says:

> "A proceeding in equity to set aside a probate decree for fraud in procuring it is a direct as contradistinguished from a collateral attack." (See 15 R. C. L. 729, 873)

And also in the same opinion cited in 9 A. L. R., page 1123, the court says:

> "Probate proceedings and a decree in probate proceedings may be assailed in a direct proceeding in a court of equity of general jurisdiction on the ground of fraud, or other grounds of equitable recognizance for the same reason other decrees and judgments of nisi courts may be assailed in equity."

and cites in support of this statement a long list of cases.

Under this state of facts we, therefore, represent to this Honorable Court that it cannot be justly said that this Respondent, plaintiff in the case below, conceded jurisdiction or invoked the jurisdiction of the county court of Creek County, Oklahoma.

**"III. The Judgment of the County Court Refusing to Vacate the Decree Was in Conformity to Local Law."**

We concede as to this proposition that so far as the mechanics and procedure followed in the probate court were concerned it followed the local law. We also concede

that under our statutes E. A. Kelleam was entitled to appointment as Administrator. He had preferential right to appointment, but all of the cases cited by petitioners under this subdivision of their brief, contemplate of course that all of the facts were disclosed to the court and that designated heirs under the statute of this state be named to the court and their relation to the estate set out. All of the cases cited by counsel under this subdivision of the brief are cases where an heir had failed to receive his distributive share—but had had his day in court—and then sought to have a court of equity give him that which he had had an opportunity in the probate court to obtain and had simply slept on his rights.

There is a vast difference between the facts in all these cases and the facts in the case at bar. The record in this case clearly discloses that E. A. Kelleam and his sister Nell Southard started out from the very beginning to obtain this entire estate. They did not name and disclose to the county court that there were half-blood heirs at the time of petitioning for letters, and never revealed this information to the court until two of these heirs had come in to contest their right in the county court to this estate. And then they did not simply conceal information from the court but they contracted with these two sets of heirs to pay them $4000.00 conditioned on the fact they were able to get by with the county court on their new theory that this was an ancestoral estate, and that no contest be made before the appeal time would elapse so no appeal could be taken from this Order.

On page 34 of petitioners' brief, the petitioners point out that one of the claimants testified, "My sister heard that the estate had been administered and told me. That was two years ago last October". This statement we know is in the record and of course if the witness were not mistaken, just merely calculating from dates, petitioners' statement that this date was prior to the decree of heirship would be correct, because this witness was testifying

in June 1939 and that statement would place the time as October 1936, which of course would be prior to the decree of heirship. Surely from this whole record and the statement itself it can be and will be ascertained by any reasonable mind that the date was after the decree of heirship because the statements show that her information was that the estate had already been administered. This can serve only one purpose in the world and that is to show that one of these heirs knew of the existence of the probate proceedings in time to have come into the county court. Surely this mere single incident on the part of one claimant if it were true would not defeat the substantial rights of all these litigants.

The petitioners, at the bottom of page 34 of their brief, make this statement,

> "Construction of administration laws of the state by the Supreme Court of the state is binding on the federal courts. Such laws are not merely rules of practice, but laws limiting the rights of the parties."

In support of that statement petitioners cite the case of *Security Trust Co.* v. *Black River Nat'l Bank,* 187 U. S. 211, 23 Supl. Ct. Rep. 52, 47 L. Ed. 147. We have examined this case and the only thing it holds is that the Federal Court is bound by the statute of limitation of the state where the court is sitting.

**"IV. It Was the Duty of the Federal Court to Sustain the Plea of the Petitioners to Dismiss the Bill of the Surety for Want of Jurisdiction at the Trial."**

This respondent shall answer all of the issues raised by the petitioners under this division of their brief and as to the sub-divisions thereunder (a) (b) (c) (d) under the one heading and shall discuss them all together.

This action was commenced by the Maryland Casualty Company for exoneration by having a lien impressed upon certain property distributed by the administrator to him-

self and to his sister and to impound, keep and hold this property for indemnity against loss; and this action was as said by the Circuit Court of Appeals:

> "An action to impress a trust on real and personal property with a fixed situs in the Northern and Western Districts of Oklahoma."

Section 116, title 28 U. S. C. A. provides that a local action involving property of fixed character lying partly in one district and partly in another may be brought in the district court of either district. Sec. 118, title 28, U. S. C. A. provides for service of summons on absent defendants in suits to enforce liens. (Tr. p. 141) As said by the Circuit Court of Appeals,

> "These are the applicable statutory provisions to an action such as we have here, and not sections 111 and 112, 28 U. S. C. A. upon which the appellants rely."

Our lawsuit must stand or fall on this proposition. That is—that this was an action to impress a trust upon real and personal property located and having a fixed situs in the northern and western districts of Oklahoma. Two things must exist. That is, that our action must be to impress a lien, trust or claim in and to such property located in such districts, or our action must fail. Two things must exist; a right of action in the Maryland Casualty Company at the time the suit was brought and property of a fixed nature located in the northern and western districts of Oklahoma. And unless this is sustained we cannot hope to sustain this action and the judgment of the lower courts, and it is to that purpose we address all of the matters involved in sub-divisions of IV of petitioner's brief.

Nearly all courts of the various states and the federal courts almost universally recognize the right of a surety to protect itself against a loss and an inevitable loss against its principal and have allowed this protection under almost every conceivable remedy known to and recognized by our jurisprudence. Oklahoma especially is committed to this

doctrine. Our State Legislature has enacted this right in statute. Section 88 Oklahoma Statutes 1931. O. S. A. title 12, Sec. 1108, says:

> "SUIT BY SURETY BEFORE LIABILITY DUE. A surety may maintain an action against his principal, to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist, upon which, by the provisions of this code, an order may be made for arrest and bail, or for an attachment" (R. L. 1910 Sec. 5308).

O. S. A. title 12, Section 1109 says:

> "In such action the surety may obtain any of the provisional remedies mentioned in Articles 8, 9 and 10 upon the grounds and in the manner therein prescribed."

Oklahoma cases sustaining this right even include the harsh remedy of attachment as follows: *Walton et al.* v. *Williams*, 5 Okla. 642, 49 P. 1022; *Morley Const. Co. et al.* v. *Maryland Casualty Co.*, 8 Cir., 90 F. 2nd 976; *Glades County, Fla.* v. *Detroit Fidelity & Surety Co.*, 5 Cir., 57 F. 2nd 449.

Also as said by the Circuit Court of Appeals in this case (Tr. p. 142):

> "It has also been frequently held that in such an action a receiver may be appointed pending the determination of the issues in the action for exoneration. O. S. A. Title 12, Section. 1551, Sec. 773 Okla. Stat. Sanford v. U. S. Fidelity & Guaranty Co., 116 Ga. 689, 43 S. E. 61; Stulz-Sickles Co. v. Fredburn Const. Corp., 114 N. J. Eq. 475, 169 At. 27; Central Surety & Ins. Corp., et al. v. Bagley, (D. C. Colo.) 44 F. 2nd 808; Southwestern Surety Ins. Co. v. Wells, (D. C. Pa.) 217 F. 294."

So that under the fixed and recognized local law of the State of Oklahoma this surety had a perfect right to proceed against any of the property of E. A. Kelleam that might be found in this state. The surety found property located in two of the federal districts of this state and it elected to and did bring this action in the Northern District of Oklahoma—

one of the districts in which property was located, and under Sec. 116 U. S. C. Ann. Title 28 (Judicial Code Sec. 55), it had a perfect right to do this. Then under U. S. C. Ann. Title 12, Section 118 (Judicial Code Sec. 57) Maryland Casualty Company had a perfect right to issue the warning order and proceed as it did proceed.

So that it is clearly demonstrated that this action was authorized by the local law of the State of Oklahoma and was a civil case cognizable by the federal courts and was concerning property that has a fixed character with its situs in the northern district of Oklahoma and there was, as is shown by this record, a diversity of citizenship shown to exist between the plaintiff in the original action, the Maryland Casualty Company, and all of the other defendants in that action.

Surely it will not be contended that this surety did not have a right, under the facts alleged to exoneration and protection of the courts.

*Morley Construction Co. et al.* v. *Maryland Casualty Company,* (C. C. A. 8th Cir. 1937) 90 F. (2nd) 976, (syllabus):

> 1. "Quia timet is a name given to a bill in equity filed by a person fearing some future injury to his rights in property, real or person, from the negligence, fault, or fraud of another."
>
> 2. "Where surety on construction bond given in connection with public building contract, seeking to compel application of installments paid on contract to payment of labor and materials going into building, alleged that outstanding bills amounted to more than $100,000, that the final estimate together with balance of funds on hand from prior installments which have been paid did not equal that sum, and that insolvent construction company unless restrained would convert or conceal funds, resulting in irreparable loss to surety, surety was entitled to remedy of exoneration."

Certiorari was denied 302 U. S. 748, 82 L. Ed. 578, 58 S. C. 266, rehearing denied, 302 U. S. 779, 82 L. Ed. 602, 58 S. C. 362.

In that case the relief sought by the surety was to impress a trust or lien upon funds paid its principal, the contractor of a public building, and the federal government had paid the contractor by checks which were deposited in a Kansas City, Mo. bank. The Supreme Court of the United States in the case of *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 81 L. Ed. 593, held that the cause should be remanded to the Court of Appeals to pass upon the question whether relief in the form of exoneration is proper under the circumstances. This was done in 90 F. (2d) 976, and certiorari denied as above indicated.

There are other cases illustrative of a surety's right of exoneration that are strong and well reasoned cases.

*Glades County, Fla.* v. *Detroit Fidelity & Surety Co.*, (C. C. A. 5th Cir.) 57 F. (2d) 449. This case is quite instructive.

> "As between surety and bankrupt contractor whose trustee refused to pay materialmen, equity of exoneration held to arise without payment by surety and without suit against it."

Receivership is a proper remedy for enforcing the right of exoneration.

*Sanford* v. *United States Fidelity & Guaranty Co.*, (Ga. Sup. Ct. 1902) 116 Ga. 689, 43 S. E. 61.

*Central Surety & Ins. Corporation, et al.* v. *Bagley*, (Dist. Ct. S. D. Calif. Cent. Div.) 44 F. (2nd) 208.

There are many other cases where equity has recognized a surety's rights of exoneration and enforced it in many ways. Injunctions have been granted, receivers appointed and equitable garnishments have been granted, and funds traced and applied, as stated in *Glades County, Florida* v. *Detroit Fidelity & Surety Co.*, previously cited, at page 452, of 57 F. (2).

**"V. It Was the Duty of the Court to Sustain Motion to Dismiss Both the Bill and the Cross Petition at the Trial for Want of Jurisdiction."**

Under this subdivision of the petitioners' brief very much the same contention is made as is made in sub-division IV. The petitioners contend and claim that because there was not shown to be a diversity of citizenship between the petitioners herein and the cross petitioners, to-wit; the full-blood heirs and the half-blood heirs that this defeats jurisdiction of the federal court. Petitioners contend that it was the duty of the trial court to realign the parties according to their interests. Clearly from the entire record in this case it is disclosed that there was no common interest and no common purpose to be served between the Maryland Casualty Co., plaintiff in the lower court and the cross petitioners. The interests of the cross-petitioners was adverse to the interest of the Maryland Casualty Company and there was no common interest between them. The only thing that was ever complained of in the trial court or the Circuit Court of Appeals and seriously urged was the failure to properly allege diversity of citizenship between the plaintiff and all of the defendants. This came about in the only serious argument the petitioners ever advanced that the petition of the plaintiff in the trial court used the word "residence" instead of the word "citizenship." This question was raised in the lower court, and raised in the Circuit Court of Appeals and there briefed and argued on the proposition that the "allegation of residence" was not the equivalent of the "allegation of citizenship." The Trial Court and then the Circuit Court of Appeals dealt with this question and the Trial Court as did the Circuit Court of Appeals passed upon this proposition. It was admitted in the Circuit Court of Appeals that the allegations in the complaint were perhaps defective, but that the entire record and the pleadings showed that the Maryland Casualty Co., was a resident and citizen of Maryland and that all of the other defendants resided and were citizens and residents outside the state of Maryland, and thus created a diversity of citizenship that fixed jurisdiction upon the district court

of the Northern District on the basis of diversity of citizenship. This was held upon the authority of the following cases:

*Realty Holding Co.* v. *Donaldson,* 268 U. S. 398, 45 S. Ct. 521, 69 L. Ed. 1014;
*Wolfe* v. *Insurance Co.,* 148 U. S. 389, 13 S. Ct. 602, 37 L. Ed. 493;
*Robertson* v. *Cease,* 97 U. S. 646, 24 L. Ed. 1057.

The Circuit Court of Appeals further held and it is supported by a number of cases that failure to properly allege diversity of citizenship between the plaintiff and defendants will not, however, defeat the jurisdiction of the federal court, if as a matter of fact, such diversity exists.

*Halsted* v. *Buster,* 119 U. S. 341, 7 S. Ct. 276, 30 L. Ed. 462;
*Continental Ins. Co.* v. *Rhoads,* 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380;
*Howe* v. *Howe & Owen Ball Bearing Co.,* 8 Cir. 154 F. 820;
*Fidler* v. *Roberts,* 7 Cir. 41 F. 2nd 305.

Then the Circuit Court of Appeals took up the question of the alleged defective averment of diversity of citizenship but held where the court is satisfied in the light of all the testimony, that the averments of residence in a designated state were intended to mean and reasonably construed must be interpreted as meaning that it was a citizen of that state, it sufficient to sustain federal jurisdiction, citing the case of *Sun Printing & Publishing Ass'n* v. *Edward,* 194 U. S. 377, 24 S. Ct. 696, 48 L. Ed. 1027.

The Circuit Court of Appeals further points out that under oath, in the County Court, E. A. Kelleam states that his address was Drumright, Okla.,—Nell Southard was a resident of Blanchard, Okla., and the petitioning defendants herein in their answers (Tr. 50/55) admit the residence and citizenship of the plaintiff Maryland Casualty Company and admit the alleged residence of the petitioning defendants, and all they denied on information and belief was that the

cross-petitioning defendants were residents and citizens of the State of Arkansas and State of Oklahoma and that part of the defendants lived in the State of Oklahoma and within the northern district. The proof disclosed to the satisfaction of the trial court and to the satisfaction of the Circuit Court of Appeals that all defendants lived in and were citizens of states, other than the citizenship of the Maryland Casualty Company.

It is a well settled rule of law that proof of the residence of a person is prima facie evidence that he is a citizen thereof and especially is this true when no issue upon that fact is made by the citizen whose residence and citizenship is under question. *Mahon* v. *Somers, et al.* cc Ohio, 112 F. 174; *Anderson* v. *Watt*, 138 U. S. 694, 11 S. Ct. 449, 34 L. Ed. 1078; *Desmore* v. *U. S.*, 93 U. S. 605, 23 L. Ed. 959.

Maryland Casualty Company had a claim in equity for exoneration and lien upon the property which by this action was sequestered by the receivership to satisfy the requirement of the statute that an equitable lien or claim existed. That the surety has an equitable lien or claim on the property is supported by the following decisions.

*Morley Construction Co. et al.* v. *Maryland Casualty Co.*, 90 F. (2) 976;
*Glades County, Fla.*, v. *Detroit Fidelity & Surety Co.*, 57 F. (2) 449;
*Southwestern Surety Ins. Co.* v. *Wells, et al.*, 217 F. 294;
*Walton* v. *Williams*, 5 Okla. 262, 43 Pac. (2) 1028;
*Des Moines Bridge & Iron Works* v. *Plane et al.*, 163 Iowa 18, 143 N. W. 866;
*Taylor* v. *Harris' Admr. et al.*, 164 Ky. 654, 176 S. W. 168;
*Republic Nat. Bank & Trust Co. et al.*, v. *Massachusetts Bonding & Ins. Co.* (C. C. A. 5th Circuit) 68 Fed. (2) 445.

Petitioners seek to avoid the judgment of the trial court by asserting this is an action in personam and not in rem. In this connection it will be clearly noted that the decree

of the trial court makes and attempts to grant no relief or to act in any way except against the res. (Tr. 78-82) No personal judgment was rendered or attempted to be rendered; only a lien created upon the property.

That such a lien or equitable claim was created by the act of the administrator in distributing this property and existed when this action was filed, is clearly supported by the facts in this case and by authority of law. *Porter et al.* v. *Cook*, 63 Fed. (2) 637.

In the case of *Porter Land & Water Co.* v. *Baskin*, 43 Fed. 323, it is held that a statute to establish a trust in real estate may be brought under Sec. 118 U. S. C. A. title 28, even though the action also seeks an accounting. It is contended by the petitioners that it was the duty of the trial court to realign the parties in accordance with their real interest. In this connection we believe it is clearly evident by the record, and as we have heretofore pointed out in this brief, that this was an action between the Maryland Casualty Co., plaintiff below, and all of the other defendants and that there was no necessity for the trial court making any different alignment and the court found no realignment of the parties to be necessary.

In the case of *Republic Nat'l Bank & Trust Co.* v. *Massachusetts Bonding & Trust Co., supra,* the Court so held in a similar case to this in the following language:

> "That some of resident defendants in nonresident surety's action seeking application of retained fund to discharge of claim favored relief prayed, occasioned no realignment of parties to destruction of surety's right to federal jurisdiction.
>
> "Where surety sued as nonresident seeking application of retained fund to discharge obligations and made numerous residents claimants parties defendant, dependent jurisdiction arose to settle disputes, even between citizens of same state and involving amount less than $3000.00 so far as necessary fully to administer fund."

The petitioners contend that this is a transitory action and not a local action. In that contention we believe the petitioners are clearly in error—that this contention cannot be maintained. This is an action to impress a trust on real and personal property with a fixed situs in the northern and western districts of Oklahoma and is local in its nature.

Plaintiff in the trial court could have attained no relief sought by it in any other court except either the northern district or the western district of Oklahoma. A receiver was appointed over property located in this district and this action was local in its nature. In the case of *Primos Chemical Co.* v. *Fulton Steel Co.*, 254 Fed. 455, the Court so held (syllabus 9):

> "A suit for the appointment of receivers to conserve and protect the assets of a corporation is one of a local nature, within Judicial Code, Sec. 54, (Comp. St. 1916 Sec. 1036) and under section 55 (section 1037) cannot be maintained in a district wherein the corporation was not domiciled and had no property of a fixed nature."

Also the case of *Tyler et al.* v. *Stanolind Oil & Gas Co.*, 77 Fed. (2) 802, first syllabus is as follows:

> "As respects jurisdiction of federal district court, suit to remove cloud on title to realty presented an equitable action, and was 'local' in character."

The Courts further hold that in order to maintain a location action same must be brought where the property is located; such as is the holding of the case of *Hills* v. *F. S. Harmon & Co.*, 56 Fed. (2) 662, wherein the court holds (first syllabus):

> "'Local', within statute providing where suits of local nature must be brought, is fixed place or determinate zone identified with given region."

Under these authorities we believe it is clear that this action was of a local nature and not a transitory action.

The Maryland Casualty Company could not have maintained this action and conserved this property and had a trust impressed upon it in any other district except either the northern or western districts of the State of Oklahoma and it had a right to choose in which of these districts it would bring this action.

## CONCLUSION.

For the reasons hereinabove set out and under the authorities there cited, this Respondent respectfully submits that this action was one cognizable by the U. S. District Court of the northern district of Oklahoma and that the said district court had jurisdiction of the subject matter and acquired jurisdiction to impress the lien which it did impress and determine the matters which it adjudicated, and that this decree should be sustained and the opinion of the Circuit Court of Appeals for the 10th Circuit should be affirmed and in all things approved.

Respectfully submitted,

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